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Supreme Court of the United States.

WILLIAM J. TURPIN, *Appellant*,

AGAINST

J. B. LEMON AND A. W. LEMON, *Appellees*.

Appeal From the Circuit Court of the United States for the District of West Virginia.

FILED NOVEMBER 1, 1901.

Brief of McCluer & McCluer, on Behalf of the Appellees, by John G. McCluer.

STATEMENT OF CASE.

William J. Turpin, a citizen of the state of Pennsylvania, on the 30th day of April, 1874, purchased from Virginia S. Hill executrix and William H. Hill executor of Smith C. Hill two hundred and twenty-five (225) acres of land lying on the waters of Dutchman Run in the County of Ritchie and

state of West Virginia, for which a deed was duly made and delivered to him. In the year of 1879 100 acres of this land was sold for delinquent taxes for prior years, and was purchased by D. McGregor and James McKenney, which left 125 acres of the said tract still belonging to William J. Turpin. And this 125 acres was assessed to him for the years 1883 and 1884, as appears from Exhibits Nos. 2 and 3 filed with the complainant's bill in this cause, and a part of record between pages 8 and 9. Turpin it seems paid no attention to this land and paid no taxes, and it was returned delinquent for the non-payment of the same for the years 1883 and 1884, and was sold by the Sheriff of Ritchie County, for the said delinquent taxes on the 12th day of January, 1886. This appears from Exhibit No. 6 with printed record.

As will be hereinafter shown, Turpin had the right to redeem this land within a year from the time of the sale, to-wit, from the 12th day of January, 1886. This he did not do, and on the 3rd of February, 1887, a deed was made by G. W. Amos, clerk of the County Court of Ritchie County to J. B. Lemon and A. W. Lemon, the appellees, conveying this tract of land of 125 acres lying on Dutchman's Run, as aforesaid, the description of which is correctly set out in the bill of complaint as appears in record on page 2.

Turpin paid no taxes to the state and made no effort to pay any until about the 15th day of April, 1899, he proposed to the appellees to pay a part of these taxes and asked that they then re-deed him the land. This, they refused to do, and on the 15th day of April, 1899, he filed his bill in equity in the Circuit Court of the United States for the District of West Virginia, asking the court to declare the sale and deed made by G. W. Amos, Clerk of the County Court of Ritchie county, to J. B. Lemon and A. W. Lemon, for this 125 acres of land, to have been made without due process of law, and to declare the same null and void, and a cloud upon his title to the same; to set aside the same, and to declare the appellees without right, title or interest in said land. And further praying that the appellees be enjoined from interfering in any way

with the possession of the plaintiff of the said tract of land and his rights therein, and also prayed for general relief.

To this bill a demurrer was filed by the appellees, through their attorneys, McCluer & Forrer, on the 6th day of June, 1899,—as appears from page 16 of printed record; and on the 5th of August, 1899, an order was entered submitting the cause to the court upon demurrer to the complainant's bill; which order will appear on page 17 of printed record.

On the 14th day of August, the court having considered the cause upon the bill and demurrer of appellees,—sustained the demurrer and dismissed the complainant's bill at the cost of complainant. From this decree the plaintiff below appealed,—as will appear from pages 17 and 18 of Printed Record.

From the petition of appellant, William J. Turpin for an appeal, (filed before the Circuit Court of the United States for the District of West Virginia, on August 14th, 1900,) it will appear that there is really but one question brought before this court for consideration, and that question is, whether the laws of the state of West Virginia enacted with reference to the sale of delinquent lands for taxes in that state are contrary to the constitution of the United States. Other questions are raised by the complainant in his bill, but in his petition these seem to be waived, and the appellant relies upon, and rests his case on the single question of the unconstitutionality of these laws as enacted by the legislature of West Virginia.

Although in the assignment of errors on page 19, from the 8th and 9th assignments of error it would appear that the appellant complains that the court erred in sustaining the demurrer, because "No report of survey of said land was made and placed of record before the making of said deed, as required by the statute of West Virginia;" and also that the deed was void because the description was not sufficient to locate the land."

ARGUMENT.

In presenting the claims and views of the defendants

we will first consider the 8th and 9th assignment of errors found on page 19 of Printed Record. These errors as assigned are in keeping with the allegations contained in the complainant's bill, which were as follows:

1st. "It does not appear that the land was certified by the auditor of the state to the sheriff to be sold by him.

2nd. It does not appear that the Sheriff published notice of the sale as required by law.

3rd. It does not appear that the sale was made at the time required by law.

4th. It does not appear that the sale was made at the place designated.

5th. It does not appear that the sale was a public sale.

6th. It does not appear that the land was sold to persons who would take the least number of acres and pay the taxes thereon.

7th. It does not appear in general or specific terms that the sale was made in accordance with the provisions of the laws of the state of West Virginia."

It will be observed by reading the bill of complaint filed in this cause that it is admitted by the plaintiff that the statute of West Virginia met each and everyone of these objections contained in his bill as to the legality of this sale by the provision in section 25, chapter 31, page 219 of the Code of West Virginia, 1891, which is as follows: "And no irregularity, error or mistake in the delinquent list, or in the return thereof, or in the affidavit thereto, or in the list of the sales filed with the clerk of the County Court, or in the affidavit thereto, or in the recordation of such list or affidavit, or as to the manner of laying off any real estate so sold, or in the plat, description or report thereof, made by the surveyor, or other person shall, after the deed is made, invalidate or affect the sale or deed."

"And if the deed be valid under the sale for the state taxes it shall not be affected or impaired by any irregularity in the proceedings or sale for the County, District or other taxes, or any of them."

Now the affidavit prescribed by the statute of West Vir-

ginia to be appended to the list of land sold as follows: "I, A. B., Sheriff of the County of. .....do swear that the above list contains a true account of all the real estate within my county, which has been sold by me, (as well as a list of all real estate redeemed, and the name of the persons who redeemed the same) during the present year for the non-payment of taxes thereon, for the year.....and that I am not now, nor have I at any time been, directly or indirectly interested in the purchase of any of said real estate so help me God."..... Sheriff. "Sworn to and subscribed before me this.....day of.....&c."

So by reference to page 13 of Printed Record it will be seen that the sheriff of Ritchie County has substantially, if not literally complied with the requirements of the statute in this affidavit and also the affidavit attached to the lists of land sold by him.

Hence it is submitted to the court that no objection to any irregularity in the sale of this land can be made after the deed was executed by the clerk of the county court of Ritchie County to the defendants; and if such objection could be taken then the record itself will show that such objection is not well taken.

Section 15, chap. 31, Code of West Virginia, 1891, page 212 is as follows: "The owner of any real estate so sold, his heirs or assigns, or any person having a right to charge such real estate for debt, may redeem the same by paying to the purchaser his heirs, or assigns, within one year from the sale thereof, the amount specified in the receipt mentioned in the 10th section of this chapter, and such additional taxes thereon as may have been paid by the purchaser, his heirs or assigns, with interest on said purchase money, and taxes at the rate of twelve per centum per annum from the time the same may have been so paid."

The 10th section referred to is as follows: "Memorandum of real estate sold in the county of.....on this ..... day of..... 18.....for the non-payment of taxes charged thereon in the said county, for the year or years 18....."

(Here follows a statement similar to the lists as they appear on pages 10 and 11 of Printed Record.)

And then follows, "Received of ....the above sum of .....it being the whole amount paid by him for the purchase money of the real estate mentioned in this memorandum, including costs of publication and the fee for this receipt."

It further appears from page 12 of Printed Record that the land set forth in the bill of complaint in this cause, was sold by the Sheriff of Ritchie County in the month of January, 1886, (which by mis-print states 1896) for the non-payment of taxes for the years 1883 and 1884. And the affidavit annexed thereto, as appears on page 13 was made on the first day of February, 1886, and the deed made by the Clerk of the County Court to J. B. and A. W. Lemon was the 3rd day of February, 1887, and was admitted to record upon the 5th day of January, 1887. Thus, giving the plaintiff in this cause more than one year to take advantage of any irregularity, if any existed in connection with the proceedings had, the advertisement of, and sale of this property. No such objection was made; and after nearly twelve years from the date of this sale, and from the time it passed into the hands of the purchasers who have paid the taxes upon the same continuously from the date of the deed this plaintiff comes into a court of equity and asks that this sale be set aside.

Section 1, chapter 104, Code of West Virginia, 1901, under the head of "LIMITATIONS OF ENTRY ON, OR ACTION FOR LANDS" is as follows: "No person shall make an entry on, or bring an action to recover any land, but within ten years next after the time at which the right to make such entry or bring such action shall have first accrued to himself, or to some person through whom he claims."

Hence, even the right of the plaintiff to institute this proceeding for the recovery of this land, and to set aside the deed under which the defendants held was barred by the state of West Virginia on the 4th day of February, 1897, because the ten years from the execution of the deed had inter-

vened on the 4th day of February, 1897. And this suit was not instituted until the 15th day of April, 1899.

Passing over this view of the case we further submit, that each and every point raised by the plaintiff in his bill as to the legality of this tax sale is met by the decision rendered by the Supreme Court of West Virginia in the case of

Winning vs. Ekin, 44 W. Va. Rep., pgs. 27, 28, 29, 30, &c.

And in this case the court holds "That the land owner must avail himself of any defects before the deed is made; and if he does not he is presumed to have waived them, and cannot thereafter make use of them to avoid the deed."

It will be further noticed that it is not stated or claimed by the plaintiff in his bill that any tender was made to the defendant in this case within the twelve months from the date of the sale, and prior to the execution of the deed; but, on the contrary, it is admitted indirectly by the plaintiff that no tender was made until about twelve years after this deed was made by the Clerk of Ritchie County, to the defendants for this land. And then, it is not claimed by the plaintiff that he tendered the amount required by the laws of W. Va., to entitle him to redeem even though the tender had been made within the year allowed him to redeem. He says that he tendered an amount of money, but does not claim that he tendered the amount of the taxes, costs, &c, incurred by the defendants in the payment of the purchase money, for the survey and the deed and all the subsequent taxes with *twelve per cent interest.* The defendants do not deny that some money was tendered, but by their demurrer admit it. Yet, the defect in the pleading in failing to state the amount of taxes, but giving a gross sum claiming that that would have covered all with interest could but mean interest at six per cent, and hence, it is not well pleaded in the bill, because while the statute of West Virginia declares the legal interest is six per cent, yet it requires the party redeeming to pay 12 per cent as a penalty.

Nor does the plaintiff claim in his bill that he did that

which is required by the statute even within the twelve months; that is, that he tendered the payment of the taxes for each year with interest from the date of the payment thereof to the time that he made the tender. This cannot be inferred, and not being alleged therefore must be taken that it was not done.

Independent of the defects in said bill above referred to we state that this bill is defective in other respects, as follows: It is provided by the Code of West Virginia, 1891, section 25, chapter 31, page 218 that "A tax deed made pursuant to this act shall convey such title as was vested in the former owner or owners of the property, unless such irregularity appear on the face of such proceedings of record in the office of the Clerk of the County Court, *and be such as to materially prejudice and mislead the owner of the real estate so sold, as to what portion of the real estate was so sold, and when and for what years it was sold, and the name of the purchaser thereof*; not then, unless it be clearly proven to the court or jury trying the cause *that but for such irregularity the former owner of such real estate would have redeemed the same under the provisions of this statute.*

It is nowhere alleged in the complainant's bill that he has been materially prejudiced and mislead by any of the proceedings taken for the sale of this land, nor has he charged in his bill that but for such irregularity he would have redeemed the same as provided by law; hence, we submit to the court that the demurrer to this bill was well taken on this ground alone, because, these facts must be alleged and shown to the court before a bill of this character can be maintained.

Winning v. Ekin, et al, 44 W. Va. Rep., p. 25.

This statute of West Virginia deals with all real estate within the limits of the state alike. It is not class legislation in favor of, or against any special or particular class, but affects alike all of the land owners within the limits of the state and is uniform throughout the state; hence, it is not in violation of Article 10 of the Constitution of West Virginia.

WAS THIS TAX SALE DUE PROCESS OF LAW UNDER THE FIRST SECTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

Taxes can be imposed and collected under a state law, and though property is seized and sold therefor without suit, it is due process, and does not violate the amendment.

"States as a general rule have the right of determining the manner of levying and collecting taxes on private property."

Witherspoon v. Duncan, 4th Wall. 210.

Judge Brannon in his work entitled "The Fourteenth Amendment" page 148, quoting from Cooley Com. Lim. 587 says, "Power to impose taxes is one so unlimited in force, so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it."

"The United States Constitution does not profess in all cases to protect against oppressive and unjust taxation by states."

Memphis Gas L. Co. v. Shelby County, 109 U. S., 398.

In McMillan vs. Anderson, 95th U. S. 37 it is held, "That the revenue laws of the state may be in harmony with the fourteenth amendment, though they do not provide that a person shall have opportunity to be present when a tax is assessed, or that it shall be collected by suit."

And again in Wulzen v. Board, 40 AM. St. R. I., the court there says "Taxes are not, as a general rule, collected by judicial proceedings, and the procedure resorted to for their imposition and collection may be properly recorded as due process of law if it conforms to customary usages" See also

Crandall v. Nevada, 6th Wall. 35.
Fallbrook v. Bradley, 164 U. S., 113.
McCullough v. Maryland, 4th Wheat., 317.

In Bells Gap. R. R. Co. v. Pennsylvania, 134 U. S. 232, and in Palmer v. McMahon, 133 U. S. 660, the court states this fact: "Process of taxation does not require the same kind of notice as in a suit at law or proceedings under *power of eminent d main.* It involves no violation of due process of law when executed according to customary forms and established usage."

This must be so, else the existence of government might be put in peril by delay attendant upon formal judicial proceedings for collection of taxes.

The best definition of due process of law which we can find is given in Hagar v. Reclamation Disct. 111 U. S., 701; and Merchant v. Pend. R. R. Co., 153 U. S., 387, as stated by the court. "It is sufficient to say that by due process of law is meant one which, following the forms of law is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained, and whereever it is necessary for the protection of the parties, it must be given them an opportunity to be heard respecting the justice of the judgment sought. The clause, therefore, means that there can be no proceeding against life, liberty or property which may result in deprivation of either, without the observance of those general rules established in our Supreme Court of Jurisprudence for the security to private rights."

SALE OF LANDS FOR THE BENEFIT OF THE SCHOOL FUND.

Chapter 105, Code of West Virginia, 1891, provides: "All waste and unappropriated land within this state, and all lands in this state heretofore vested in the state of Virginia by *escheat* forfeiture or *purchase at Sheriff's or collector's sale for delinquent taxes*, and not released and exonerated, *or redeemed within one year* according to law; all lands heretofore, or hereafter purchased for this state, at a sale thereof for taxes, and not redeemed within one year according to law, and all lands forfeited to this state for the failure to have the same entered

upon the land books of the proper county, and charged with the taxes thereon, as provided by law; shall: so far as the title thereof shall not be vested in junior grantees, or claimants, under the provisions of the Constitution and laws of this state be sold for the benefit of the school fund, in the manner hereinafter prescribed. The Auditor shall certify to the Clerk of the Circuit Court a list of all such lands, which in whole or in part lie in his county within sixty days after the title thereof shall vest in the state."

This act further provides that the commissioner of school lands shall report to the Circuit Court of the County in which the land lies once in each year a list of all tracts of land, in whole or in part; (referred to in section one.) and a suit shall be brought for the sale of these lands forfeited.

Any person may enter their appearance who has title to the land, or a claim against it at any time before the sale." It provides, for the publication of this list, a reference to the commissioner and the report of the commissioner, and then the sale by the commissioner of school lands under the decree of court.

This act was attacked as violating the State Constitution, and the Fourteenth Amendment of the Federal Constitution; in that, it deprived the land owner of property without due process of law.

In the case of the State v. Sponaugle and others, decided November 30th, 1898, and reported in 45th W. Va. Rep., page 415, and also State v. Cheney and others reported in 45th W. Va. Rep., page 415, the Supreme Court of West Virginia held that this legislation was consistent with the state and federal constitutions, and had been so declared in the case of King v. Mullins 171 U. S., 404, which opinion was rendered by Justice Harlan on the 31st of May, 1898.

In the second paragraph of the syllabus in this case is as follows: "If the statute of the state in connection with its constitution gives the tax-payers reasonable opportunity to protect his lands against a forfeiture he has no grounds to

complain that his property has been taken without due process of law."

The owners of real estate in West Virginia are required under her laws to pay annually a tax upon that land. And if they fail to pay, then, the statute law of West Virginia prescribes how the state may collect her taxes, which is, by a sale of the property so delinquent by the Sheriff of the County in which the real estate is situate. The owner of the property then has a right within twelve months from the date of the sale of the same by the sheriff to redeem by the payment of the amounts specified by statute, with twelve per cent interest, and also any taxes which the purchaser may have paid upon the said land subsequent to the date of his purchase with twelve per cent interest. If the owner fails to do this, then the statute further provides that the purchaser shall receive a deed for the said land from the Clerk of the County Court.

Now, this statute in connection with the Constitution of the state of West Virginia gave to his appellant (as to all other tax-payers) reasonable oppportunity to protect his lands against a sale; and if sold it still gave him a reasonable opportunity to redeem his land. And since he failed in both cases, that is, to either pay his taxes or to redeem his land as provided by statute after the same was sold, and within the year provided, he has no ground to complain that his property has been taken without due process of law.

And even though this law with reference to the sale of lands in West Virginia for delinquent taxes might be considered oppressive, yet, the National Supreme Court will not declare that this sale was not due process of law, because, "the constitution of the United States does not profess in all cases to protect property from unjust or oppressive taxation by the states" (only in mode or the manner of the enforcement of their collection) that is left to the state Constitutions, and the State laws.

Memphis Gas L. Co. v. Tax. Disct. of Shelby Co., Tenn. 109 U. S. page 398.

And this question is also discussed in

Francis Palmer, vs. McMahon, Receiver of taxes of the city of New York, 133 U. S., 660.

"Both the forfeiture and sale process were held valid by the courts of the State of Virginia long before the Fourteenth Amendment existed. The proceeding for the sale of land under the Statute of Virginia were not proceedings by suit *inter partes* but was an *ex parte* proceeding to sell the land with no provision for a hearing to the owner; and this is fully discussed in the cases of

McClure v. Maitland 24 W. Va. Rep. 561; and
McClure vs. Mauperture, 29th W. Va. Rep., 633.

And in Brannon on the Fourteenth Amendment, page 262 is the following: "The Virginia courts in several cases held that the Virginia statute proprio vigore without office found or inquisition judicial in its nature forfeited the land and invested the state with its title, and that such statutes were constitutional."

He further says "That while it is true that those decisions ante-dated the Fourteenth Amendment, but there was in the Virginia constitution a provision, that no one should be deprived of his property without due process of law."

And by reference to the Virginia authorities under Virginia Statutes it will be seen that the state of Virginia had long resorted by such forfeiting statute to the means therein prescribed, and ordinary process for the enforcement of the payment of her taxes were ancient, usual and due process for the enforcement of her rights against delinquent taxpayers long before the Fourteenth Amendment. And the Fourteenth Amendment does not affect these decisions, and as stated by Judge Brannon are not impugned by it.

The Virginia cases cited are as follows:

Wild v. Serpell, 10 Gratt. 405;
Statts v. Board, 10 Gratt. 400;
Levasser v. Washburn, 11 Gratt. 572;
Usher v. Pride, 15 Gratt. 190;
Armstrong v. Morrill, 14 Wall. 120.

And following in the line of these decisions the Supreme Court of the State of West Virginia in the case of the State against Sponaugle and others before cited, in third paragraph of syllabus states as follows: "Due process of law does not always require judicial hearing. It does in matters of purely judicial nature, but not in matters of taxation, or matters purely administrative."

And questions similar to that involved in this case are ably discussed in the opinion rendered in the

Slaughter House cases, 16 Wall. 78;
Hurtado v. Cal. 110 U. S. 537.

These cases deal principally with the rights of citizens as guaranteed by the constitution of the U. S. and which is regulated and enforced by the state legislature.

We therefore, insist that the decree of the Circuit Court of the United States for the Northern District of West Virginia sustaining the demurrer of the defendant to the complainant's bill, and dismissing the bill of complaint was right and should be affirmed.

J. G. McCLUER,
of McCluer & McCluer Atts. for Appellee.